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14 **UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

15 FEDERAL HOUSING FINANCE AGENCY,  
16 in its capacity as Conservator of Federal  
National Mortgage Association and Federal  
17 Home Loan Mortgage Corporation; FEDERAL  
NATIONAL MORTGAGE ASSOCIATION;  
18 and FEDERAL HOME LOAN MORTGAGE  
CORPORATION,

19 Plaintiffs,

20 vs.

21 SFR INVESTMENTS POOL 1, LLC, a  
22 Nevada Domestic Limited Liability Company,

23 Defendants.

CASE NO. 2:15-cv-02381-GMN-NJK

**PLAINTIFFS' OPPOSITION TO  
DEFENDANT'S MOTION FOR  
RECONSIDERATION**

24 **INTRODUCTION**

25 The district-court phase of this case ended months ago; the action is now with the Ninth  
26 Circuit on SFR's appeal.<sup>1</sup> Yet SFR asks this Court to interrupt that appeal and reverse itself on

27 <sup>1</sup> Any capitalized terms not defined in this brief are defined in Plaintiffs' Motion for  
28 Summary Judgment (ECF No. 66).

an issue SFR can and should simply present in the appeal—whether the existing record warranted summary judgment without further need for discovery. Neither extraordinary circumstances nor good cause supports SFR’s motion for reconsideration, and regardless, this Court’s summary judgment ruling was thoughtfully considered and entirely correct. The Court should deny SFR’s motion.

SFR has a strong economic incentive to pursue pointless discovery and to otherwise prolong the litigation so that it can collect extra months of rent until the Ninth Circuit finally resolves this case. The most efficient way to move this case to final resolution is to deny SFR’s Motion for Reconsideration and let this matter proceed to a decision by the Ninth Circuit. The Ninth Circuit is familiar with Federal Foreclosure Bar litigation and has already affirmed a decision from this Court that rejected a Rule 56(d) request for more discovery. If the Ninth Circuit likewise affirms this Court’s order, then all the courts in this District will receive on-point guidance sooner that Rule 56(d) relief is unnecessary in cases like this.<sup>2</sup> But if this Court issues an indicative ruling to grant Rule 56(d) relief, then the Ninth Circuit’s final resolution of these cases, which backlog the federal courts in Nevada, could easily be delayed.

## **BACKGROUND AND PROCEDURAL HISTORY**

17        This case is a quiet title action concerning 83 properties. The facts about each property  
18        are materially the same: for each property, a borrower obtained a loan that was eventually  
19        acquired by one of the Enterprises. (ECF No. 127). Each property was also subject to a  
20        foreclosure sale initiated by an HOA to recoup overdue assessments; at the time of each HOA  
21        Sale, the Enterprise continued to own each Loan, with one of two types of entities appearing as  
22        record beneficiary of the associated deed of trust: (1) the Enterprise’s contractually authorized  
23        servicer; or (2) MERS, as nominee for the Enterprises. (*Id.*)

24 This case was subject to a complete stay that was lifted on July 17, 2018, when the Court  
25 entered the parties' stipulated scheduling order in which Plaintiffs informed SFR that they

<sup>2</sup> As explained *infra*, the Ninth Circuit has already affirmed an award of summary judgment that included a denied Rule 56(d) motion. But parties like SFR appear unpersuaded until the Ninth Circuit directly—and in no uncertain terms—rejects their meritless arguments.

1 intended to file a Motion for Summary Judgment and a Motion to Stay Discovery. (ECF No.  
 2 56.) During the subsequent two months, the Enterprises made initial disclosures and produced  
 3 Enterprise business records and publicly recorded documents. SFR did not seek any depositions  
 4 or issue any interrogatories. Then, on September 18, 2018, Plaintiffs filed a motion for summary  
 5 judgment. (ECF No. 66). On September 21, 2018, Plaintiffs also filed a motion to stay  
 6 discovery pending adjudication of their summary judgment motion, (ECF No. 70).

7 Not until December 4, 2018, did SFR serve notices of Rule 30(b)(6) depositions on  
 8 Fannie Mae and Freddie Mac. (ECF No. 100-1). Thus, SFR did not seek a deposition until more  
 9 than *four months* after Plaintiffs informed SFR that they intended to move for summary  
 10 judgment, and over *two months* after Plaintiffs filed their Motion for Summary Judgment.

11 Following motions practice with regard to various discovery disputes, Magistrate Judge  
 12 Koppe stayed all discovery “on an interim basis pending resolution of the pending motion to stay  
 13 discovery.” (ECF No. 114.) On February 6, 2019, SFR filed its Opposition to Plaintiffs’ Motion  
 14 for Summary Judgment and a Counter-Motion for Rule 56(d) Relief. (ECF Nos. 115, 116.) And  
 15 in each of SFR’s discovery-related filings, it made substantially the same arguments it makes  
 16 here.

17 On March 30, 2019, this Court granted Plaintiffs’ Motion for Summary Judgment,  
 18 finding that Plaintiffs’ evidence—in the form of business records, a supporting declaration, and  
 19 the Guide—was evidence “deemed sufficient” by the Ninth Circuit to prove that the Enterprises  
 20 owned each loan. (ECF No. 127 at 7-8.). This evidentiary finding is substantially supported by  
 21 Ninth Circuit authority. As a result, this Court rejected SFR’s Rule 56(d) request because the  
 22 Ninth Circuit “has explicitly rejected” each of the arguments SFR made to challenge Plaintiffs’  
 23 evidence and the clerk entered judgment the next day. (ECF Nos. 127, 128).

24 On April 29, 2019, SFR timely appealed, thereby transferring jurisdiction over this  
 25 matter to the Ninth Circuit. In that appeal, SFR has contended in its Ninth Circuit mediation  
 26 questionnaire that “it was an abuse of discretion [for this Court] to reject its Rule 56(d) request.”  
 27 Notice of Appeal *Fed. Hous. Fin. Agency v. SFR Invs. Pool 1, LLC*, No. 19-15910, ECF No. 2  
 28 (9th Cir. May 7, 2019).

## **LEGAL STANDARD**

## I. This Court's Jurisdiction During Pendency of an Appeal

“Once a notice of appeal is filed, the district court is divested of jurisdiction over the matters being appealed.” *Nat. Res. Def. Council, Inc. v. Southwest Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). However, Rule 62.1 allows a district court to take certain, limited actions in response to motions filed during the pendency of an appeal. Fed. R. Civ. P. 62.1. Under this rule, a district court that lacks jurisdiction to grant the moved-for relief because of a pending appeal may (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue. *Id.* 62.1(a).

## II. Motion for Reconsideration

Under Rule 60(b), a court may relieve a party from a final judgment, order, or proceeding only in the following circumstances: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied; or (6) any other reason justifying relief from the judgment. Fed. R. Civ. P. 60(b); see also *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir. 2000). However, a court may only grant Rule 60(b) relief in “extraordinary circumstances.” *Buck v. Davis*, 137 S. Ct. 759, 777 (2017).

While disposition of a motion for reconsideration is within the district court's discretion, *Bliesner v. Commc'n Workers of Am.*, 464 F.3d 910, 915 (9th Cir. 2006), that motion is properly denied when the movant fails to establish any reason justifying relief. *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir.1985) (holding that a district court properly denied a motion for reconsideration in which the plaintiff presented no arguments that were not already raised in his original motion). Reconsideration is not a mechanism for parties to make new arguments that could reasonably have been raised in their original briefs. *see Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

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1           **III. Rule 56(d) Relief**

2           When considering a party's Rule 56(d) request for discovery, the Ninth Circuit asks a  
 3 district court to consider four factors: (1) whether the movant had sufficient opportunity to  
 4 conduct discovery; (2) whether the movant was diligent; (3) whether the information sought is  
 5 based on mere speculation; and (4) whether allowing additional discovery would preclude  
 6 summary judgment. *See Martinez v. Columbia Sportswear USA Corp.*, 533 F. App'x 760, 761  
 7 (9th Cir. 2014) (citing *Qualls By and Through Qualls v. Blue Cross of Calif., Inc.*, 22 F.3d 839,  
 8 844 (9th Cir. 1994); *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2002);  
 9 *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1436-37 (9th Cir. 1995); *Michelman v.*  
 10 *Lincoln Nat. Life Ins. Co.*, 685 F.3d 887, 892 (9th Cir. 2012)). To prevail on its Rule 56(d)  
 11 request, a party must show that "(1) it has set forth in affidavit form the specific facts it hopes to  
 12 elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential  
 13 to oppose summary judgment." *Midbrook Flowerbulbs Holland B.V. v. Holland Am. Bulb*  
 14 *Farms, Inc.*, 874 F.3d 604, 619-20 (9th Cir. 2017).

15           **ARGUMENT**

16           **I. SFR Has Failed to Meet Its Burden for Reconsideration**

17           SFR's Motion for Reconsideration merely rehashes its arguments previously made and  
 18 rejected by this Court. For this reason alone, this Court should reject SFR's Motion for  
 19 Reconsideration. *Kona Enters.*, 229 F.3d at 890. But this Court should also deny SFR's motion  
 20 because SFR does not raise any new law, new facts, or other "extraordinary circumstances" that  
 21 could otherwise justify Rule 60(b) relief.

22           Instead, SFR's sole theory supporting its Motion for Reconsideration is reference to a  
 23 single instance in which this Court granted *limited* and *discretionary* Rule 56(d) relief in similar  
 24 litigation. See ECF No. 132 at 6-7 (citing *Fannie Mae v. SFR Invs. Pool 1, LLC*, No. 2:18-cv-  
 25 001584-GMN, 2019 WL 2176918, at \*4-5 (D. Nev. May 20, 2019) (*McCloud*)).<sup>3</sup> But the

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27           <sup>3</sup>        McCloud refers to the last name of the borrower in that case. Using the last name of  
 28 borrowers is an effective method to distinguish the hundreds of HOA foreclosure cases that  
 otherwise have identical parties.

1        *McCloud* order is an outlier among the vast majority of decisions in this District that deny Rule  
 2        56(d) relief because the Ninth Circuit repeatedly deems evidence materially identical to that in  
 3        the record as “sufficient” to establish an Enterprise’s property interest. Indeed, the Ninth Circuit  
 4        affirmed an order granting summary judgment that also rejected a Rule 56(d) request. *Elmer v.*  
 5        *JPMorgan Chase Bank, NA*, 707 F. App’x 426, 428 (9th Cir. 2017). And in *Elmer*, the Ninth  
 6        Circuit described Enterprise business records as “reliable and uncontested,” indicating that the  
 7        accuracy of Enterprise business records could not be contradicted and therefore implicitly  
 8        recognized that the appellant’s Rule 56(d) request was pointless. Accordingly, this Court need  
 9        not have granted Rule 56(d) relief in *McCloud*.

10              In any event, the circumstances of this case differ materially from those underlying  
 11        *McCloud*. In that case, the plaintiff filed a motion for summary judgment less than three months  
 12        after filing the complaint. The Court relied upon this “pre-discovery” posture as the primary  
 13        reason to grant relief, *McCloud*, 2019 WL 2176918, at \*5. Here, in contrast, SFR received  
 14        discovery, including all of the business records that Plaintiffs produced in response to SFR’s  
 15        Requests for Production. Next, the *McCloud* decision was a *discretionary* order that cannot  
 16        constitute new or controlling authority on any issues in this case. And unlike this Court’s  
 17        decision in *this* case, the *McCloud* decision did not conduct any analysis of the business record  
 18        evidence supporting that plaintiff’s summary judgment motion. Here however, this Court  
 19        conducted a full evidentiary review of the business records supported by employee declarations  
 20        and concluded that SFR’s evidentiary arguments failed in light of Ninth Circuit authority. (ECF  
 21        No. 127 at 7-8). Consequently, this Court correctly concluded that there was no basis to grant  
 22        Rule 56(d) relief. Finally, the *McCloud* Court’s conclusion that Fannie Mae’s business record  
 23        evidence “does not . . . constitute[] irrebuttable proof” of Fannie Mae’s ownership of that loan  
 24        was contrary to Ninth Circuit authority explaining the basis of the business records exception of  
 25        the hearsay rule. Specifically, the Ninth Circuit stated that the “basis for the business record  
 26        exception is that *accuracy is assured*” because businesses rely on those records to conduct their  
 27        daily activities. *City of Long Beach v. Standard Oil Co. of California*, 46 F.3d 929, 937 (9th Cir.  
 28        1995) (emphasis added). Yet here, SFR has not offered *any* argument or pointed to *any* evidence

1 from its long history of litigating Federal Foreclosure Bar cases that there are any indicia of  
 2 unreliability with the Enterprise business records supporting Plaintiffs' motion for summary  
 3 judgment. For example, SFR has never identified any internal inconsistencies, omissions, or  
 4 unexplainable anomalies in the material sections of the business records, and has not pointed to  
 5 any contradictory evidence that might question the assured accuracy of Enterprise business  
 6 records as to whether the Enterprise owned a loan. Indeed, as explained below, SFR's purported  
 7 inconsistencies are irrelevant to any material fact. Consequently, any intended discovery by SFR  
 8 would constitute a pointless fishing expedition, while buying SFR more time to collect rental  
 9 income from the properties at issue.

10       In light of the prevailing Ninth Circuit rulings on the sufficiency of evidence in Federal  
 11 Foreclosure Bar litigation—and the Ninth Circuit's affirmance of a summary judgment granted  
 12 over a Rule 56(d) objection in *Elmer*—courts in this District routinely deny Rule 56(d) requests.  
 13 Most recently, one court issued a reasoned opinion denying a Rule 56(d) request by SFR,  
 14 holding that evidence materially identical to that in the record here has “repeatedly been found as  
 15 sufficient evidence establishing [an Enterprise’s] property interest for purposes of the Federal  
 16 Foreclosure Bar.” Order, *Bank of Amer., N.A. v. SFR Invs. Pool 1, LLC*, No. 2:16-cv-2768-  
 17 MMD, ECF No. 130 (D. Nev. June 4, 2019). As a result, the court reasoned that “no further  
 18 discovery is warranted.” *Id.*; *see also M&T Bank v. SFR Invs. Pool 1, LLC*, No. 2:17-cv-1867-  
 19 JCM-CWH, 2018 WL 6003854, at \*3 (D. Nev. Nov. 15, 2018).

20       SFR has no sound reason to expect this case to be any different from those seven Ninth  
 21 Circuit opinions—SFR is uniquely familiar with the reliability of Enterprise business records and  
 22 has already deposed Enterprise witnesses repeatedly. *See Berezovsky v. Moniz*, 869 F.3d 923,  
 23 929 (9th Cir. 2017); *FHFA v. SFR Invs. Pool 1, LLC*, 893 F.3d 1136, 1149 (9th Cir. 2018), *cert.*  
 24 *denied*, No. 18-760, 2019 WL 1886041 (Apr. 29, 2019); *Saticoy Bay, LLC, Series 2714*  
 25 *Snapdragon v. Flagstar Bank, FSB*, 699 F. App’x 658 (9th Cir. 2017); *Elmer*, 707 F. App’x at  
 26 428; *Williston Inv. Grp., LLC v. JPMorgan Chase Bank, NA*, 736 F. App’x 168, 169 (9th Cir.  
 27 2018); *G&P Invs. Enters., LLC v. Barney*, 740 F. App’x 563, 564 (9th Cir. 2018); *JPMorgan*  
 28 *Chase Bank, NA v. Las Vegas Dev. Grp.*, 740 F. App’x 153, 154 (9th Cir. 2018). Thus, SFR’s

1 complaint that Plaintiffs “dumped thousands of documents—mainly consisting of [business  
 2 records] . . . on SFR’s proverbial doorstep,” (ECF No. 132 at 2), just before filing the Motion for  
 3 Summary Judgment is a red herring meant to convince this Court that SFR never had an  
 4 opportunity to understand or investigate the evidence.<sup>4</sup> That’s untrue. SFR was not prejudiced  
 5 or at a disadvantage due to the timing of Plaintiffs’ production of business records and the filing  
 6 of the Motion for Summary Judgment, for at least two reasons. *First*, as frequent repeat players,  
 7 SFR and its counsel are familiar with the format and content of the Enterprise business records at  
 8 issue in this case and others like it. *Second*, SFR in substance granted itself a four-month  
 9 extension of its deadline to respond to Plaintiffs’ summary-judgment motion, thereby taking for  
 10 itself more than ample time to analyze the supporting evidence. (*See* ECF No. 84 (SFR’s  
 11 October 14, 2018 motion to extend the time to respond to Plaintiff’s Motion for Summary  
 12 Judgment); ECF No. 95 (Plaintiffs’ opposition to SFR’s motion to extend time); ECF No. 115  
 13 (SFR’s February 6, 2019 response to Plaintiff’s Motion for Summary Judgment)). Notably, SFR  
 14 never received the Court’s permission to file such a late response to the Motion for Summary  
 15 Judgment.

16       Consequently, the minuscule probative value of the discovery SFR seeks does not warrant  
 17 the cost and burden of preparing and making available a witness to testify about numerous  
 18 properties. But the imbalance between benefit and burden is of no concern to SFR, which has a  
 19 strong economic incentive to pursue pointless discovery and to otherwise prolong the litigation  
 20 regardless of the disparity. SFR bought the properties for far less than fair market value, but now  
 21 collects rent at market rates. Until the cost of litigation consumes the entire spread, SFR has an  
 22 obvious incentive to do whatever it can to forestall affirmation of this Court’s judgment. By  
 23 contrast, the Enterprises receive *no* return on their substantially larger, market investment in the

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24       <sup>4</sup> SFR also makes the accusation that Plaintiffs “outright refused to provide SFR access to  
 25 any documents listed in their July 30, 2018 initial disclosures.” (ECF No. 132 at 2). This is  
 26 obviously false; those are the documents Plaintiffs produced to SFR in response to its discovery  
 27 request and attached to the MSJ they filed only a few weeks after the discovery conference. In  
 28 any event, SFR misinterprets Rule 26(a)(1), which expressly authorized Plaintiffs to include in  
 their initial disclosures “a description by category and location—of all documents . . . that the  
 disclosing party . . . may use to support its claims” in lieu of producing documents at the outset.  
 Fed. R. Civ. P. 26(a)(1)(A)(ii).

1 now-defaulted loans secured by the properties. In substance, therefore, until this case is finally  
 2 resolved SFR will reap a return on the Enterprises' investment; it therefore has a strong incentive  
 3 to stave off final resolution, perhaps by seeking to short-circuit its pending appeal by procuring a  
 4 premature and unnecessary remand that could lead only to lengthy and unproductive discovery.

## 5 **II. SFR Has Failed to Meet Its Burden for Rule 56(d) Relief**

6 This Court should deny Rule 56(d) relief even if it believes SFR has carried its  
 7 "extraordinary circumstances" burden for reconsideration under Rule 60(b). *Buck*, 137 S. Ct. at  
 8 777. Rule 56(d) requires the moving party to articulate specific facts that discovery would elicit  
 9 and that would preclude summary judgment by creating a genuine dispute about a material fact.  
 10 While a court may believe Rule 56(d) is warranted in some scenarios, this is not one of them.  
 11 SFR has not and cannot identify any fact it wishes to investigate that could preclude or alter this  
 12 Court's order awarding summary judgment in favor of Plaintiffs.

13 To warrant Rule 56(d) relief, a party carries the burden to show that the sought-after facts  
 14 are essential to oppose summary judgment." *Midbrook*, 874 F.3d at 619-20. Yet here, SFR only  
 15 seeks depositions with regarding to three topics: (1) why "the beneficiaries of the deeds of trust  
 16 [do] not even match up with the entity Plaintiffs claimed were acting as their servicers during the  
 17 relevant time periods," (ECF No. 132 at 2-3); (2) why "several deeds of trust were never  
 18 assigned and still listed Mortgage Electronic Registration Systems, Inc. ("MERS") as the  
 19 nominee beneficiary (*id.* at 3); and (3) why Taylor Bean & Whitaker Mortgage Corp.'s ("TBW")  
 20 appearance as a servicer in Freddie Mac's business records might create a dispute of material  
 21 fact. (*id.*).

22 For the reasons below, SFR has not explained how any of these facts are essential to  
 23 oppose summary judgment. Rather, Defendant's strategy is to engage in a costly fishing  
 24 expedition in the hopes of casting doubt on the evidence produced by Plaintiffs. But the  
 25 nonmoving party must show "more than 'metaphysical doubt as to the material facts.'" *Berezovsky*,  
 26 869 F.3d at 933 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574,  
 27 586 (1986)). Accordingly, this Court should reject Defendant's attempt at seeking unnecessary,  
 28 irrelevant, and duplicative discovery. *See, e.g., M&T Bank*, 2018 WL 6003854, at \*3 (denying

1 Rule 56(d) relief in Federal Foreclosure Bar litigation). Rule 56(d) relief is unwarranted here.

2                   **i. SFR Has Had an Opportunity to Conduct Discovery**

3                   The first factor a court looks to in order to determine whether to grant Rule 56(d) relief is  
 4 whether the moving party had an opportunity to conduct discovery. *Martinez*, 533 F. App'x at  
 5 761 (citing *Qualls.*, 22 F.3d at 844).

6                   SFR has unquestionably had a sufficient opportunity to conduct discovery. In this case,  
 7 as SFR concedes, it received initial disclosures and Plaintiffs' production of documents in  
 8 response to SFR's "Requests for Production and Interrogatories." (See ECF No. 116 at 27.)  
 9 SFR had the opportunity to review Plaintiffs' evidence over the course of four months before  
 10 responding to Plaintiffs' Motion for Summary Judgement. Indeed, after reviewing Plaintiffs'  
 11 documents, SFR itself moved for summary judgment, thereby indicating its belief that it could  
 12 win without additional discovery. (See ECF No. 117.) Thus, this Court should view SFR's  
 13 request for additional discovery with suspicion because SFR's decision to file its own summary  
 14 judgment motion illustrates its belief that no discovery was warranted.

15                  Nor should this Court ignore SFR's familiarity with Enterprise business records and their  
 16 corporate practices. It would be one thing if SFR never had an opportunity to test its theories  
 17 against Enterprise evidence. But that is not the case; SFR has examined Fannie Mae and Freddie  
 18 Mac witnesses in at least 16 trials or depositions in cases presenting materially the same legal  
 19 issues and Enterprise business records:

- 20                  • SFR deposed another Fannie Mae employee, Eric Maltese, regarding the same topics in  
     21 February 2018 for *SFR Invs. Pool 1, LLC v. Fannie Mae*, No. A-14-706235-C;
- 22                  • SFR questioned Mr. Maltese at trial in April 2018 in *SFR Invs. Pool 1, LLC v. Fannie*  
     23 *Mae*, No. A-13-678094-C;
- 24                  • SFR deposed Mr. Maltese again in *Alessi & Koenig LLC v. Clapp*, A-15-713687-C on  
     25 May 22, 2018;
- 26                  • SFR once again deposed Mr. Maltese in May 2018 in *Fannie Mae v. SFR Invs. Pool 1,*  
     27 *LLC*, No. A-13-685602-C.;
- 28                  • SFR again deposed Mr. Maltese in July 2018 in *SFR Invs. Pool 1, LLC v. Ditech*  
     29 *Financial LLC*, No. 1-14-695848-C;

- 1     • SFR deposed Mr. Maltese again in August 2018 in *Green Tree Servicing LLC v. SFR Invs. Pool 1, LLC*, No. A-15-722155-C.;
- 2     • SFR again questioned Mr. Maltese at trial in September 2018 in *Alessi & Koenig LLC v. Weiss*, No. A-13-690490-C.;
- 3     • SFR also deposed Mr. Maltese in September 2018 in *Bank of America, N.A. v. SFR Invs. Pool 1, LLC*, No. A-13-681936-C.;
- 4     • Previously, SFR had questioned John Curcio, a former Fannie Mae employee, in July 2016 at the trial in *SFR Invs. Pool 1 LLC v. Green Tree Servicing*, No. A-13-691242-C.;
- 5     • SFR examined Mr. Curcio again in August 2016 at the trial in *Fannie Mae v. SFR Invs. Pool 1 LLC*, No. A- 13-692633-C;
- 6     • SFR also deposed Mr. Curcio in connection with a case in this District, *Fannie Mae v. SFR Invs. Pool 1*, No. 2:14-cv-2046-JAD-PAL, in February 2016.
- 7     • SFR has deposed Freddie Mac's declarant Dean Meyer in five separate cases, most recently in November and December 2018: *SFR Invs. Pool 1, LLC v. Bank of America*, N.A., No. A-14-696138-C; *SFR Invs. Pool 1, LLC v. Bank of America*, N.A., No. A-14-696561-C; *M&T Bank v. SFR Invs. Pool 1, LLC*, 2:17-cv-01867; *SFR Invs. Pool 1, LLC v. Washington Mutual Bank, FA*, No. A-12-672769-C; and *Ocwen Loan Servicing, LLC v. SFR Invs. Pool 1, LLC*, 2:17-cv-01757.

13                 In each of these cases, SFR questioned the Enterprise witness at length about the  
 14                 Enterprise business records, attempting to call into question their relevance, competence  
 15                 accuracy, and reliability. SFR has had plenty of opportunity to understand the evidence and test  
 16                 its theories about Enterprise evidence, but it has been unable to identify any *material* issues with  
 17                 the business records or declarant testimony that would prevent summary judgment. Indeed, had  
 18                 SFR identified any weakness in Enterprise business records, SFR would have raised such issues  
 19                 in matters before this Court and the Ninth Circuit. But SFR has never done that because its  
 20                 repeated examinations of Enterprise witnesses have confirmed only one thing—Enterprise  
 21                 business records are reliable, accurate, and highly probative of Enterprise ownership of real  
 22                 estate mortgage loans. So while SFR may argue that it is required and entitled to test the  
 23                 evidence in every case, the fact that SFR has questioned Enterprise witnesses at least 16 times  
 24                 and *never* found that the business records were inaccurate or unreliable is independently  
 25                 indicative that more depositions are simply disproportionate to these needs of this case.

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1 Accordingly, this Court should not provide SFR with another fishing expedition in light of its  
 2 repeated opportunities to examine Enterprise witnesses about Enterprise business records.<sup>5</sup>

3                   **ii.       SFR Failed to Diligently Seek Discovery**

4                   The second factor a court looks to determine whether to grant Rule 56(d) relief is whether  
 5 the moving party was diligent. *Martinez*, 533 F. App'x at 761 (citing *Pfingston*, 284 F.3d at  
 6 1005).

7                   SFR fails this factor. In July 2018, Plaintiffs informed SFR that they intended to move  
 8 for summary judgment and stay discovery. (See ECF Nos. 56, 57.) Nevertheless, SFR again did  
 9 not seek to depose any Enterprise witness until December 2018, more than two months after  
 10 Plaintiffs filed their Motion for Summary Judgment on September 19, 2018. SFR may argue that  
 11 it never had a chance to conduct deposition discovery before this point because it claims  
 12 Plaintiffs “dumped thousands of documents—mainly consisting of [business records] . . . on  
 13 SFR’s proverbial doorstep,” (ECF No. 132 at 2), just before filing the Motion for Summary  
 14 Judgment. But this argument ignores wholesale the fact that SFR and its counsel are familiar  
 15 with Enterprise business records having litigated dozens of materially identical cases. SFR knew  
 16 what evidence the Plaintiffs would disclose and use to support the Motion for Summary  
 17 Judgment, but nevertheless, did not seek depositions until many months later. Moreover, SFR  
 18 issued a discovery request to which Plaintiffs responded by producing Enterprise business  
 19 records for each of the properties at issue in this case. If SFR or its counsel had specific  
 20 questions about the business records Plaintiffs produced, SFR could have issued interrogatories,  
 21 but it did not. SFR and its counsel cannot explain away the absence of its diligence regarding  
 22 discovery in light of their experience and awareness of Enterprise evidence in Federal  
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24                   Nor should the Court construe these repeated depositions as suggestive of a relatively  
 25 small burden on the Enterprises to prepare a witness. Unlike previous depositions that focused  
 26 on ownership of a *single* property, the depositions here would focus on 83 properties, thereby  
 27 substantially increasing the burden on the Enterprises to prepare a witness. In addition,  
 28 Enterprise corporate witnesses have full-time jobs at each Enterprise. Their jobs are critical to  
 the efficient operation of the Enterprises and time spent preparing for a deposition involving  
 dozens of properties would necessarily have a detrimental impact on each witness’ professional  
 obligations. In any event, because the depositions seek disproportionate discovery entirely  
 unnecessary based on Ninth Circuit authority, *any* burden on the Enterprises is excessive.

1 Foreclosure Bar litigation. Nor can SFR explain why it granted itself a four-month extension to  
 2 respond to Motion for Summary Judgment without leave of this Court.

3 Given SFR's familiarity with Enterprise business records and its experience litigating the  
 4 Federal Foreclosure Bar, SFR was aware of the issues presented and knowledgeable about  
 5 Enterprise business records. Any party in SFR's position would have diligently sought  
 6 depositions or issued specific interrogatories had it truly believed discovery was necessary. But  
 7 SFR did not. Instead, it waited many months after Plaintiffs moved for summary judgment. This  
 8 Court should find that such behavior lacks the diligence necessary to support Rule 56(d) relief.

9                   **iii. SFR's Evidentiary Theories Are Based on Metaphysical Doubt and**  
 10                   **Speculation**

11                  The third factor is whether the moving party's discovery requests are based on  
 12 speculation. *Nordstrom*, 54 F.3d at 1436-37.

13                  This factor also weighs against SFR because it bases its Rule 56(d) request on mere  
 14 speculation. As noted above, SFR has questioned Enterprise witnesses in trials and depositions  
 15 at least 16 times in related Federal Foreclosure Bar litigation. Yet, despite SFR's exhaustive  
 16 investigation of Enterprise witnesses and analysis of Enterprise business records over the years,  
 17 SFR has never identified any inaccuracy or reason to believe Enterprise business records are  
 18 inaccurate. Indeed, SFR's failure to identify inaccuracies in Enterprise business records aligns  
 19 with Ninth Circuit authority; having reviewed and analyzed Enterprise business records in *seven*  
 20 appeals, the Ninth Circuit has confirmed that Enterprise business records are "sufficient" to  
 21 prove that an Enterprise owned a loan. *See e.g., Williston*, 736 F. App'x at 169. This Ninth  
 22 Circuit holding recognizes that where business records are submitted, their "*accuracy is assured*"  
 23 because the maker of the record relies on the record in the ordinary course of business activities."  
 24 *City of Long Beach*, 46 F.3d at 937 (internal citation omitted) (emphasis added). Consequently,  
 25 SFR does not ground its discovery requests on any articulable and objective belief that Enterprise  
 26 business records are wrong. Instead, SFR merely speculates and hopes that a *seventeenth*  
 27 examination of an Enterprise witness will reject what the Ninth Circuit has already held, chiefly  
 28 that Enterprise business records are reliable with "assured" accuracy.

1    iv.     **SFR Fails to Identify Any Material Fact That Would Create a**  
 2    **Genuine Dispute to Preclude Summary Judgment**

3    The fourth factor for a court to consider—which is also a factor that SFR must show as  
 4    part of its Rule 56(d) burden—is whether allowing additional discovery would preclude  
 5    summary judgment. *See Michelman*, 685 F.3d at 892; *Midbrook*, 874 F.3d at 619-20. However,  
 6    SFR has not identified any fact it wishes to discover that would have precluded this Court from  
 7    awarding summary judgment in favor of Plaintiffs. Indeed, each fact SFR says warrants  
 8    investigation is irrelevant, consistent with Enterprise ownership of each loan, or a  
 9    mischaracterization of the record.

10   SFR first argues that “the beneficiaries of the deeds of trust did not even match up with  
 11    the entity Plaintiffs claimed were acting as their servicers during the relevant time periods.”  
 12   (ECF No. 132 at 2-3.) But even if this were true, it does not create a genuine dispute of any  
 13    material fact. As Plaintiffs explained in their Motion for Summary Judgment, with respect to  
 14    nine of the 83 Properties, servicing of the associated Loan was transferred from the beneficiary-  
 15    of-record servicer (the “Transferor Servicer”) to a new servicer (the “Transferee Servicer”)  
 16    before the HOA Sale, but an assignment of the deed of trust was not executed or recorded until  
 17    after the HOA Sale was completed. Under the Guides for each Enterprise, Transferor Servicers  
 18    are not released from their contractual obligations, thereby maintaining a contractual relationship  
 19    with the Enterprises that preserve the Enterprises’ ownership of those Loans. (*See* ECF No. 66 at  
 20    19 (Fannie Mae Guide Section A2-7-03 provides that a transferee servicer’s assumption of  
 21    responsibilities “will in no way release the transferor servicer from its contractual obligations  
 22    related to the transferred mortgage loans”); *id.* (Freddie Mac Guide Section 7101.15(a) provides  
 23    similar obligations)). Thus, at the time of the HOA Sales, even though Enterprise business  
 24    records listed a servicer different than the beneficiary of record of a deed of trust, that does not  
 25    create a genuine dispute about whether an Enterprise had a property interest under Nevada law.  
 26    As the Ninth Circuit and Nevada Supreme Court have explained, so long as the beneficiary of  
 27    the deed of trust is in an appropriate contractual relationship with the loan owner, then the loan  
 28    owner (i.e. the Enterprise), maintains its property interest. *Berezovsky*, 869 F.3d at 932; *In re*

1       *Montierth*, 354 P.3d 648, 650-51 (Nev. 2015).

2                  Next, SFR claims that “several deeds of trust were never assigned and still listed  
 3                  Mortgage Electronic Registration Systems, Inc. (“MERS”) as the nominee beneficiary.” (ECF  
 4                  No. 132 at 3.) Again, this fact does not create a genuine dispute regarding an Enterprise’s  
 5                  ownership of loan. Instead, MERS’s presence as the beneficiary of record *confirms* an  
 6                  Enterprise’s property interest. The Ninth Circuit has noted that while “MERS, as the ‘nominee’  
 7                  of the lender and of any assignee of the lender, is designated . . . as the ‘beneficiary’ . . . under  
 8                  the deed of trust,” a “lender *owns* the home loan borrower’s . . . promissory note.” *In re Mortg.*  
 9                  *Elec. Registration Sys., Inc.*, 754 F.3d 772, 776 (9th Cir. 2014) (emphasis added). The true  
 10                 owner of the loan is the lender, its successor, or its assignee—not MERS. *See Cervantes v.*  
 11                 *Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011).

12                  And more importantly, on point authority from the Nevada Supreme Court confirms that  
 13                  where MERS appears as beneficiary of record, the loan owner maintains a property interest as a  
 14                  secured creditor. The Nevada Supreme Court in *Montierth* recognized that an entity which  
 15                  owned a loan was a secured creditor—meaning that it had a property interest in the collateral—  
 16                  while MERS, an entity with which it had an agency or contractual relationship, was record  
 17                  beneficiary of the deed of trust. *See Montierth*, 354 P.3d at 651 (citing Restatement § 5.4). The  
 18                  Restatement, which *Montierth* adopts, explains the relationship between “institutional purchasers  
 19                  of loans” and their authorized representatives, and states that when a servicer or nominee appears  
 20                  in the public records as beneficiary of a mortgage, “[i]t is clear in this situation that the owner of  
 21                  both the note and mortgage is the investor and not the servicer.” Restatement § 5.4 cmt. c.

22                  The same is true here. As explained in Plaintiffs’ Motion for Summary Judgment, MERS  
 23                  appears as beneficiary of record in its capacity as a nominee for the Lender and the Lender’s  
 24                  successors and assigns, which in this case includes the Enterprises. (*See* ECF No. 66 at 10-12.)  
 25                  And as the nominee, MERS appears as each Enterprise’s contractually authorized representative  
 26                  in which the Guides and the MERS System Rules of Membership provide the terms of that  
 27                  relationship. *See id.*; Miller Decl. ¶ 7, Ex. B at B869-70, ECF No. 67; Meyer Decl. Ex. 1 at  
 28                  C111-13, ECF No. 68. And where MERS appears on behalf of an Enterprise, the Ninth Circuit

1 and the Nevada Supreme Court recognize that in such a situation the loan owner retains a  
 2 property interest. *Montierth*, 354 P.3d at 650-51 (holding that a loan owner has a property  
 3 interest where MERS appears as beneficiary of record); *Elmer*, 707 F. App'x at 428 (affirming  
 4 summary judgment in Freddie Mac's favor where MERS appeared as the nominee and  
 5 beneficiary of record).

6 Finally, SFR's contention that TBW's appearance as a servicer in Freddie Mac's business  
 7 records for two of the properties fails to create a genuine dispute with regard to whether Freddie  
 8 Mac had an interest in these properties. (ECF No. 132 at 3.) Indeed, SFR's argument is built on  
 9 its mischaracterization of Freddie Mac's business records. Freddie Mac's business records  
 10 indicate that Ocwen Loan Servicing, LLC ("Ocwen") was servicing the loan secured by the  
 11 Brilliant Summit property as an "interim servicer," and, for the Silver Brook Property, servicing  
 12 had transferred from TBW to Nationstar. *See Meyer Decl.* ¶¶ 146-152, 216-222, ECF No. 168.  
 13 Thus, Freddie Mac's business records do not "defy reality" as SFR suggests, but instead the  
 14 records accurately reflect that soon after TBW went out of business, its servicing responsibilities  
 15 transferred to other entities. Nor can SFR do anything except convey its metaphysical doubt that  
 16 TBW actually sold these loans to Freddie Mac. To the contrary, the admissible evidence  
 17 supporting Plaintiffs' Motion for Summary Judgment included Enterprise business records that  
 18 the Ninth Circuit characterizes as "*reliable and uncontroverted evidence*" that the Enterprises  
 19 owned each of the loans. *Elmer*, 707 F. App'x at 428 (emphasis added). Among other things,  
 20 these records confirm that Enterprises received monthly reporting (and ,when appropriate,  
 21 remittances) from the entities servicing these loans before, at the time of, and after the HOA  
 22 Sales—which could not and would not have happened if the Enterprises did not own the loans.  
 23 As a result, SFR's metaphysical doubt whether the business records are sufficient to establish  
 24 what they unambiguously show cannot justify its desired fishing expedition.

25 Accordingly, SFR has not met its burden to justify additional discovery through a Rule  
 26 56(d) request and this Court should deny its Motion for Reconsideration.

27       ///

28       ///

## **CONCLUSION**

Plaintiffs respectfully request that this Court deny SFR's Motion for Reconsideration.

The Ninth Circuit is familiar with the evidentiary issues present in Federal Foreclosure Bar litigation and therefore is in a prime position to determine whether Rule 56(d) relief was warranted. Thus, the most efficient way forward is to deny SFR's motion and let the Ninth Circuit ultimately decide whether Rule 56(d) relief is warranted in these types of cases.

DATED: June 20, 2019.

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**CERTIFICATE OF SERVICE**

Pursuant to F.R.C.P. 5(b) and Electronic Filing Procedure IV(B), I certify that on June 20, 2019, a true and correct copy of **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION**, was transmitted electronically through the Court's e-filing electronic notice system to the attorney(s) associated with this case. If electronic notice is not indicated through the court's e-filing system, then a true and correct paper copy of the foregoing document was delivered via U.S. Mail.

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